

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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AUG 21 2019

S.C. SUPREME COURT

Certiorari to Anderson County  
J. Cordell Maddox, PCR Judge  
R. Scott Sprouse, Plea Judge  
Appellate Case No. 2018-000928

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EDRICK PEREGO,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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## **STATEMENT OF ISSUES ON CERTIORARI**

### **Petitioner's Statement of Issues on Certiorari**

Did plea counsel provide ineffective assistance by advising Petitioner to plead guilty when he suffered from dementia and there was no alleged injury to support the charge of ABHAN or evidence of intent to kill to support the indicted charge of attempted murder?

Did the PCR court err in concluding as a matter of law that Petitioner's plea was knowingly, voluntarily, and intelligently made despite his dementia, hearing loss, and the lack of a factual basis for his guilty plea.

Did the PCR court err in finding no basis for altering or amending its ruling in response to Petitioner's Motion to Alter or Amend filed pursuant to Rule 59(e) SCRCPP.

### **Respondent's Counterstatement of Issues on Certiorari**

The PCR court properly denied relief where Petitioner failed to establish Counsel was constitutionally ineffective in regards to advising Petitioner to plead guilty to the lesser-included offense of ABHAN because there was a factual basis to support Petitioner's conviction for attempted murder, where Petitioner made the strategic decision to plead guilty knowingly and voluntarily despite his dementia and hearing loss, and where the arguments raised in Petitioner's Motion to Alter or Amend did not provide any basis for the alteration or amendment of the PCR court's Order of Dismissal.

A. The PCR court correctly that plea counsel was not constitutionally ineffective for advising Petitioner to plead guilty to the lesser-included offense of ABHAN instead of proceeding to trial on attempted murder.

B. The PCR court properly found that Petitioner's guilty pleas were entered knowingly, voluntarily, and intelligently.

C. The PCR court correctly found that Petitioner did not provide any basis in its Motion to Alter or Amend the Judgement for its altering or amending its Order of Dismissal.

## STATEMENT OF THE CASE

### Procedural History

Petitioner is incarcerated with the South Carolina Department of Corrections pursuant to the Anderson County Clerk of Court's orders of commitment. In September of 2014, Petitioner was indicted for two counts of third-degree arson, and in October of 2014, for two counts of attempted murder. Herverly Young, Esquire, (hereinafter "Counsel") represented Petitioner. Assistant Solicitor Rame Lambert Campbell of the Tenth Circuit Solicitor's Office prosecuted the case on behalf of the State. On May 13, 2016, Petitioner appeared before the Honorable R. Scott Sprouse and pleaded guilty to two counts of assault and battery of a high and aggravated nature, as the lesser-included offenses of the attempted murder, and to two counts of third-degree arson as indicted. Pursuant to the State's recommendation, the trial court sentenced Petitioner to imprisonment for ten years for each offense, with the sentences to run concurrently.

Petitioner filed a timely notice of appeal and an appeal was perfected on his behalf by Appellate Defender Laura Baer of the South Carolina Commission on Indigent Defense—Office of Appellate Defense. However, Petitioner withdrew his appeal in agreement with appellate counsel. The South Carolina Court of Appeals issued an order on December 15, 2016, in which it dismissed the matter. *State v. Perego*, Appellate Case No. 2016-001108 (S.C. Ct. App. Filed Dec. 15, 2016). The Remittitur was returned to the circuit court on January 3, 2017.

Petitioner filed a timely application for post-conviction relief on June 5, 2017. Therein, Petitioner raised the following allegations:

1. Involuntary guilty plea;
  - a. "Guilty plea not knowingly, intelligently, and voluntarily entered";
  - b. "No factual basis for plea and did not understand sentencing";
2. "Ineffective Assistance of Plea Counsel";

- a. "Failed to object to unconstitutional sentence";
- b. "Failed to appeal from probation on cases";
- c. "Failure to investigate";
3. "Ineffective Assistance of Appellate Counsel";
  - a. "Advised to drop direct appeal";
4. "Unconstitutional sentence (violation of Eighth Amendment);"
  - a. "De fact life sentence violates prohibition against cruel and unusual punishment and is disproportionate"; and
  - b. "Failure to provide proper medical care".

The State (Respondent) filed a return on September 15, 2017, in which it requested an evidentiary hearing. Petitioner filed a supplemental application on February 15, 2018. Therein, Petitioner incorporated the previous allegations of Petitioner that the rights guaranteed under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the Constitution of the United States and Article I, Sections Three, Ten, and Fourteen of the South Carolina Constitution, and added the following allegations:

1. "[I]neffective assistance of plea counsel for advising [Petitioner] to plead guilty, allowing victim testimony regarding unsubstantiated allegations of criminal acts by [Petitioner] after he was imprisoned, and failing to effectively use evidence of [Petitioner's] diagnosis of dementia as mitigation of his conduct"; and
2. "Due Process violations due to the plea not being knowingly and voluntarily made, non-compliance with the [Americans with Disabilities Act] due to failure to accommodate [Petitioner's] hearing loss and no factual basis for ABHAN in the record."

An evidentiary hearing into the matter was convened on February 21, 2018, in Anderson County before the Honorable J. Cordell Maddox, Jr. At the start of the hearing, Petitioner proceeded forward solely upon the allegations raised in his supplemental application, in addition to his allegations that Counsel was constitutionally ineffective for failing to appeal from Petitioner's probation cases and Counsel's failure to investigate. Petitioner testified on his own behalf and presented the testimony of Janice Perego, who is Petitioner's wife, and Jessica Ford,

Petitioner's granddaughter. Respondent presented testimony from Counsel. The PCR court also considered Petitioner's plea transcript, the records of the Anderson County Clerk of Court, Petitioner's appellate records, and Petitioner's records from the South Carolina Department of Corrections. The PCR court allowed the parties to submit post-hearing briefs. On March 30, 2018, the PCR court issued its Order of Dismissal, in which it denied all claims raised by Petitioner and dismissed the action with prejudice. Petitioner filed a Motion to Alter or Amend the Judgement on April 12, 2018. Respondent filed its Return to Petitioner's Motion to Alter or Amend the Judgement on April 30, 2018. Therein, Respondent argued that the PCR court's Order of Dismissal contained the necessary findings of facts and conclusions of law, and fully and properly addressed all issues raised at the evidentiary hearing. On May 7, 2018, the PCR court denied Petitioner's motion. Petitioner served a Notice of Appeal on May 17, 2018, and this appeal followed.

#### **Summary of Facts Adduced at Plea Hearing**

On June 5, 2014, Becky Lash was working inside the restaurant she owned, Tiger Cove Grill. App. 13. Katie Pigeon and Joseph Brushwood were also working. App. 14. Harold Flowers had just entered the restaurant as well. App. 14. During that time, the Anderson County Sheriff's Office was evicting Petitioner from his home, which was located across the street from the restaurant. App. 13. Petitioner was then seen setting some wood in the back of his truck on fire, starting the truck, and placing a stick of wood between the gas pedal and the seat, allowing the truck to move on its own. App. 14. Petitioner proceeded to let the truck drive into the restaurant while Lash, Pigeon, Brushwood, and Flowers were inside. App. 14. Lash, who was in her office inside the restaurant at the time, was unable to get out of the building. App. 14. Flowers was then

able to get into the truck, remove the stick of wood that Petitioner placed between the gas pedal and the seat, and reverse the truck out of the restaurant. App. 14. In doing so, Flowers crashed the truck into a second truck that was being drive by Petitioner at the time. App. 14. Petitioner then set fire to a neighboring home, was thwarted from firing a second neighboring home, fled the area, and was subsequently arrested. App. 14-16.

## STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the PCR court's factual findings and will uphold them if there is probative evidence in the record to support them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the PCR court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

## ARGUMENT

**The PCR court properly denied relief where Petitioner failed to establish Counsel was constitutionally ineffective in regards to advising Petitioner to plead guilty to the lesser-included offense of ABHAN because there was a factual basis to support Petitioner's conviction for attempted murder, and where Petitioner made the strategic decision to plead guilty knowingly and voluntarily despite his dementia and hearing loss, and where the arguments raised in Petitioner's Motion to Alter or Amend did not provide any basis for the alteration or amendment of the PCR court's Order of Dismissal.**

On appeal, Petitioner argues that the PCR court erred in finding that Counsel did not provide constitutionally ineffective assistance of counsel by advising Petitioner to plead guilty to the lesser-included offense of ABHAN rather than proceeding to trial on attempted murder, argues that the PCR court erred in concluding that Petitioner knowingly and voluntarily pleaded guilty to ABHAN, and argues that the PCR court erred in finding that Petitioner's Motion to Alter or Amend provided no basis for the PCR court alter or amend its Order of Dismissal. Petitioner's argument as to ineffective of assistance of counsel is based upon his contention that there was not a factual basis to support a conviction on either ABHAN or attempted murder, that it was therefore deficient for Counsel to advise Petitioner to plead guilty to ABHAN, and that Petitioner was prejudiced because he would have demanded a trial on attempted murder had he known that there was no factual basis to support a conviction. Petitioner's argument as to an involuntary and unintelligent guilty plea is that he did not enter his guilty pleas with a full understanding of the consequences of his actions based upon Counsel's alleged ineffectiveness and his hearing loss and dementia. Petitioner's argument as to the PCR court's alleged error in denying Petitioner's Motion to Alter or Amend, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665

S.E.2d 164 (2008). Petitioner has the burden of proving the allegations in his PCR action, and when alleging that trial counsel was constitutionally ineffective, he must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that it cannot be relied upon as having produced a just result.” Strickland, 466 U.S. at 686

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, Petitioner must prove that Counsel’s performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney’s performance by its “reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). Petitioner must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, Counsel’s deficient performance must have prejudiced Petitioner such that “there is a reasonable probability that, but for Counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, Petitioner must show that there is a reasonable probability that, but for Counsel’s alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985). The “prejudice prong ordinarily requires more than simply a

defendant's assertion that but for counsel's deficient performance he would not have pled but would have gone to trial." Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 595 (2009).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether Counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668. Moreover, Strickland does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, Strickland requires the PCR applicant to prove "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 697. Therefore, the function of the PCR court is to determine if "in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance" required of a criminal defense attorney. Id. at 690.

"A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed." Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63, 74 (1977)). "Indeed, where a thorough colloquy is conducted, courts must exercise caution in setting aside the guilty plea." Garren v. State, 423 S.C. 1, 12, 813 S.E.2d 704, 712 (2018); see Jamison v. State, 410 S.C. 456, 469-71, 765 S.E.2d 123, 129-30 (2014) (observing that "guilty plea[s] must be treated as final in the vast majority of

cases” and instructing that caution must be exercised so as not to “undermine the solemn nature of a guilty plea and the finality that generally attaches to a guilty plea”).

**A. The PCR court correctly that Counsel was not constitutionally ineffective for advising Petitioner to plead guilty to the lesser-included offense of ABHAN instead of proceeding to trial on attempted murder.**

Petitioner argues that the PCR court erred in finding that Petitioner failed to prove that Counsel was ineffective for advising Petitioner to plead guilty to two counts of the lesser-included offense of ABHAN rather than advising him to proceed to trial on two counts of attempted murder because “the facts of the case do not contain evidence of a specific intent to kill to support a conviction of attempted murder” and “[t]he record established a reasonable probability that Petitioner would not have pled” if Counsel had not advised him that there was a factual basis for conviction on the attempted murder charges if Petitioner proceeded to trial. This argument is without merit.<sup>1</sup> The PCR court properly determined that there was a factual basis to support a conviction on the two indictments for attempted murder and that Petitioner pleaded guilty to ABHAN for strategic reasons and that Petitioner failed to demonstrate any prejudice suffered by Counsel’s advice to plead.

Before a court accepts a defendant’s guilty plea, it must be certain that the defendant understands the charge and the consequences of the plea. State v. Armstrong, 263 S.C. 594, 211 S.E.2d 889 (1975). Additionally, the record must indicate a factual basis for the plea. Id. However, “Armstrong does not mean that the state may not offer a defendant, charged with a greater offense, an opportunity to plead guilty to a lesser offense, notwithstanding the factual

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<sup>1</sup> Although Petitioner refers to his dementia in Argument One of the Petition for Writ of Certiorari, his dementia does not appear to form the basis of his argument that the PCR court erred in finding that there was a sufficient factual basis for Petitioner’s plea, but Petitioner’s dementia is nevertheless addressed in Section B of this Return to Petitioner of Writ of Certiorari.

basis does not precisely comport with the lesser offense.” Anderson v. State, 342 S.C. 54, 57-58, 535 S.E.2d 649, 651 (2000). A plea to any lesser-included offense is sufficient as long as there is a sufficient factual basis to support the crime for which the defendant was indicted. Id. at 58, 535 S.E.2d at 651. Furthermore, the decision to accept a guilty plea to a lesser-included offense, despite the lack of a factual element to support that offense, can be interpreted as a “tactical maneuver to avoid the very real possibility that the jury might come back with a verdict of [the indicted charge].” Id.

Petitioner’s argument that the lack of physical injury among the victims should renders Counsel’s advice that Petitioner plead guilty to ABHAN instead of proceeding to trial on attempted murder is misguided. “A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder.” S.C. Code Ann. § 16-3-600(B)(1). ABHAN occurs when there is an unlawful injury to another person and either great bodily injury to another person results or the act is accomplished by means likely to produce death or great bodily injury. S.C. Code Ann. § 16-3-600(B)(1). ABHAN is a lesser-included offense of attempted murder. S.C. Code Ann. § 16-3-600(B)(3). Counsel testified he did not remember hearing testimony at the plea hearing that the victims suffered any injury. App. 133. Assuming for the sake of argument that the victims did not sustain any injuries, offense of attempted murder does not require a physical injury. Anderson requires only that the indicted offense be supported by a sufficient factual basis. Anderson at 58, 535 S.E.2d at 651. ABHAN was the lesser-included offense of the indicted offense, and as a result, it was not required that the victims have some injury for Petitioner to plead guilty to ABHAN. Id.

at 57-58, 535 S.E.2d at 651. The alleged lack of injury is therefore irrelevant to the analysis of whether there was a factual basis for attempted murder.

Petitioner also argues that there was not a factual basis to support a conviction on the indicted offense of attempted murder because the facts of the case do not support the conclusion that Petitioner attempted to kill with malice aforethought or the specific intent to kill. The Court of Appeals held that the specific intent to kill was an element of attempted murder in State v. King, 412 S.C. 403, 411, 772 S.E.2d 189, 193 (Ct. App. 2015). “Absent an admission by a defendant, proof of intent necessarily rests on inference from conduct.” State v. Haney, 257 S.C. 89, 91, 184 S.E.2d 344, 345 (1971). Malice is “the doing of a wrongful act intentionally and without just cause of excuse.” State v. Bell, 305 S.C. 11, 19, 406 S.E.2d 165, 170 (1991) (citing State v. Judge, 208 S.C. 497, 38 S.E.2d 715 (1946)). Petitioner set wood on his truck ablaze, wedged the accelerator pedal down with a piece of wood, and let it drive into an occupied restaurant. App. 14. Counsel testified that the victims were trapped inside the burning restaurant because Petitioner’s truck was blocking their exit. App. 49. Counsel testified at the PCR hearing that the State had videos from the night of the incident and statements from witnesses and victims who were at the scene, and that his investigator was unable to produce any information or evidence that would have aided Petitioner’s defense at trial. App. 114-15. From these facts, it was within the range of competence required of defense attorneys that Counsel concluded that the facts were sufficient to show that Petitioner had acted with malice aforethought and the specific intent to kill. See King at 56, 810 S.E.2d at 22 (citing State v. Sutton, 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000) (defining “specific intent” as meaning “that the defendant consciously intended the completion of acts comprising the [attempted] choate offense.”)); see

also State v. Bell, 305 S.C. 11, 19, 406 S.E.2d 165, 170 (1991) (malice is simply doing a wrongful act intentionally and without just cause or excuse). The PCR court found that a jury could have inferred malice and the specific intent to kill through these actions. App. 178-79. Although Petitioner argues in reliance on State v. King, 422 S.C. 47, 56-57, 810 S.E.2d 18, 23 (2017), that the PCR court erred in this finding due to the finding that the jury could have inferred malice, this argument is misplaced since the Supreme Court addressed the phrase “implied malice” from the attempted murder statute because the Court of Appeals had “neglected” to do so in its opinion in King, which the Supreme Court affirmed as modified. Id. at 56, 810 S.E.2d at 22. At the time of the plea hearing, the Supreme Court had not yet issued its opinion, and only the Court of Appeals’ opinion had been published.

The evidence from the plea hearing and from the evidentiary hearing establish that Petitioner made the strategic decision to plead guilty to a lesser-included offense rather than risk trial, and that he did so based upon Counsel’s advising him based on the facts of the case. The PCR court properly concluded that Counsel’s was not constitutionally ineffective for advising Petitioner to plead guilty. Certiorari should be denied.

**B. The PCR court properly found that Petitioner’s guilty pleas were entered knowingly, voluntarily, and intelligently.**

Petitioner argues that the PCR court erred in finding that Petitioner’s guilty pleas to ABHAN were entered knowingly, voluntarily, and intelligently because Petitioner suffers from dementia and hearing loss, and because there was not a factual basis to support his guilty pleas. This argument is without merit. The PCR court properly determined that Petitioner’s pleas were entered knowingly and voluntarily because Applicant understood the consequences of his plea, understood the charges against him, and pleaded guilty of his own free will. App. 177.

Before a court accepts a defendant's guilty plea, it must be certain that the defendant understands the charge and the consequences of the plea. State v. Armstrong, 263 S.C. 594, 211 S.E.2d 889 (1975). Additionally, the record must indicate a factual basis for the plea. Id. In order for a court to find that a guilty plea was knowingly and voluntarily entered into, the record must establish that the defendant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238 (1969). Since Petitioner pleaded guilty based upon Counsel's advice, he must show that Counsel's advice was deficient and that "but for [C]ounsel's errors, [Petitioner] would not have pled guilty but would have insisted on going to trial" in order to attack the voluntary and intelligent nature of his pleas. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d, 417, 419 (2001).

The PCR court found that Petitioner's testimony about the plea discussions between Petitioner and Counsel was not credible and that Petitioner's testimony on that issue was "very credible". Counsel testified that he met with Petitioner on twenty to twenty-five occasions, and discussed the charges, the State's evidence, potential defenses, and the State's plea offer with Petitioner. App. 113-15. Counsel's investigator failed to produce any evidence that would have been helpful to Petitioner's defense. App. 115. Counsel testified that he told Petitioner that the State would likely use recordings of phone calls he made while in jail to attack his credibility since the calls indicated that Petitioner was being misleading in his claims, and that Petitioner took this into consideration when making his decision to plead guilty. App. 119. Counsel testified that it was Petitioner's decision to plead guilty and that he would have tried the case had Petitioner refused to plead guilty to ABHAN. App. 121.

The PCR court found that Counsel's testimony as to Petitioner's hearing was more credible than Petitioner's testimony based on Counsel's testimony that Petitioner was commenting to him on the statements made by others at the plea hearing and upon the ability of Petitioner to respond to questions from the plea court, which indicated that Petitioner was able to hear and follow the guilty plea proceedings. Being aware of Petitioner's hearing loss, Counsel bought a hearing aid for Petitioner to use during the plea hearing. App. 39. Although Petitioner did indicate at the plea hearing that he had some difficulty in hearing, he also affirmed that his ability to hear improved when Counsel moved the hearing aid he had provided for Petitioner from one of Petitioner's ears to the other. App. 8-6. Counsel affirmed that Petitioner was able to answer the questions asked by the plea court. App. 138. Counsel gave his opinion that Petitioner could hear "what he wanted to hear." App. 123. Counsel also testified that Petitioner would make comments to him during the plea hearing about statements made by others during the hearing, and testified that this indicated to him that Petitioner was able to hear more at the plea hearing than his testimony at the evidentiary hearing indicated. App. 59. There was ample and credible evidence before the PCR court that Petitioner's hearing loss did not make his guilty pleas involuntary or unintelligent, and its finding on this issue is correct. App. 179-80.

The PCR court found that Petitioner's pleas were entered knowingly and voluntarily. App. 177. Counsel testified that he explained the consequences of pleading guilty to Petitioner over the course of multiple meetings, and that Petitioner understood. App. 119-20. Counsel testified that he discussed potential parole eligibility dates with Petitioner and that Petitioner understood. App. 136-37. He further added that he would not have allowed Petitioner to plead guilty if Petitioner had not understood what was happening. *Id.* Not only did Petitioner affirm to

the plea court that he understood the charges against him, understood the potential sentences that he was facing, understood his trial rights, wanted to plead guilty, but he informed the court that he would ask the court to explain if he did not understand something. App. 6-7, 9-12. Petitioner affirmed the plea court that he did not have additional questions to ask of Counsel. App. 12. Petitioner agreed with the facts as presented by the solicitor. App. 18. There was adequate evidence to support the PCR court's finding that Petitioner had a full understanding of the consequences of his pleas and that the pleas were entered freely, voluntarily, and intelligently, despite his dementia. App. 177.

As argued earlier in this Return to Petition for Writ of Certiorari, the PCR court properly found that there was a factual basis for Petitioner's pleading guilty to ABHAN as the lesser-included offense of attempted murder because there was a real possibility that Petitioner would have been convicted of attempted murder had he proceeded to trial. Respondent relies upon that argument from Section A again here. Petitioner agreed with the facts as presented by the solicitor and affirmed that he wanted to plead guilty. App. 10-11, 18. Although the record from the plea hearing indicates that at times Petitioner needed some things explained or repeated again so that he could hear, the record as a whole indicates that Petitioner had a full understanding of the consequences of his action. The PCR court did not err in its finding that Petitioner's pleas were entered freely, voluntarily, and intelligently. App. 177.

The PCR court properly found that the evidence from the plea hearing and from the evidentiary hearing established there was a factual basis to support the indictments for attempted murder, and that Petitioner's pleas were entered freely, voluntarily, and intelligently, despite his trouble hearing and his dementia. Certiorari should be denied.

**C. The PCR court correctly found that Petitioner did not provide any basis in its Motion to Alter or Amend the Judgement for its altering or amending its Order of Dismissal.**

Petitioner argues that the PCR court erred in not altering or amending its Order of Dismissal because Petitioner was prejudiced by Counsel's failure to appeal the probation revocation because he was denied the right to appellate review of the denial of the revocation, Counsel admitted at the evidentiary hearing that he did not object when the solicitor relayed accusations from a victim during sentencing that the victim had been receiving threatening phone calls regarding Petitioner's case, and there was not a factual basis to support a conviction on the indicted offense of attempted murder because the facts do not show that Petitioner acted with malice aforethought or with the specific intent to kill, in reliance on Van Sellner v. State, 416 S.C. 606, 787 S.E.2d 525 (2016).

In support of his argument that Counsel was ineffective for failing to appeal Petitioner's probation violation, Petitioner contends that there would have been no benefit to him if his appeal of all other pleas had been reversed because he would still have been serving a ten-year sentence for the probation violation. Counsel has a constitutionally-imposed duty to consult with a defendant about an appeal when there is reason to think either: (1) that a rational defendant would want to appeal or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. Roe v. Flores-Ortega, 528 U.S. 470 (2000). When counsel has consulted with the defendant regarding the right to appeal, "Counsel performs in a professionally unreasonable manner *only* by failing to follow the defendant's express instructions with respect to an appeal." Flores-Ortega, 528 U.S. at 478 (emphasis added). In order to establish he was prejudiced by counsel's failure to file an appeal, Applicant must show he would

have appealed absent counsel's deficient performance. See Flores-Ortega, 528 U.S. at 484. The PCR court properly found that Petitioner did not indicate to Counsel that he wanted to appeal his probation revocation. App. 171. Petitioner did not testify at the hearing that he asked for an appeal of his probation revocation. Counsel did not testify that Petitioner specifically asked for an appeal of his probation revocation. App. 139. Although Counsel opined that he probably should have appealed the probation revocation, he testified that he did not believe that there was any appealable issue and the probation revocation was from another county. App. 140. This demonstrates that Counsel's actions were not deficient. Additionally, because Petitioner's argument for the prejudice he suffered due to Counsel's not appealing the probation revocation was based on speculation as to what would have happened had Petitioner prevailed on his direct appeal of the remaining pleas, Petitioner failed to demonstrate prejudice. App. 182. As such, the PCR court was proper to deny to alter or amend its Order of Dismissal based upon this argument.

In support of his argument that there was testimony presented at the evidentiary hearing that Petitioner was prejudiced by Counsel's failure to object to accusations from victims in the form of a letter read aloud and verbal statements relayed to the plea court by the solicitor, Petitioner contends that Counsel admitted at the evidentiary hearing that he did not object when the solicitor relayed the victim's accusations to the plea court. This contention is simply a misstatement of the testimony presented at the evidentiary hearing. Counsel was not asked at the evidentiary hearing about the victim's accusation that she had received threatening calls from Petitioner, and he did not offer any testimony on this point. Furthermore, although Counsel did not object to the accusations from the victims at the plea hearing, he did refute the accusation that Petitioner was orchestrating threats or harassment against the victims by referring to his own

review of Petitioner's jail phone calls. App. 32-33. As such, Counsel's performance was not deficient. At any rate, Petitioner has failed to show any prejudice from these comments since Petitioner pleaded guilty pursuant to a sentencing recommendation cap of ten years. App. 3. Petitioner affirmed to the plea court that he understood the sentencing cap. App. 9-10. Petitioner was sentenced to incarceration for ten years, which was a sentence within the sentencing recommendation cap for which he had bargained in his plea negotiations. App. 57. Petitioner was sentenced within the anticipated sentencing range, and has not shown that he suffered any prejudice. The PCR court was correct in finding that this argument from Petitioner's Motion to Alter or Amend did not provide any basis upon which the court would alter or amend its Order of Dismissal.

In support of his argument that there was not a factual basis to support a conviction for attempted murder, Petitioner cited Van Sellner in support of his argument. As argued in Respondent's post-hearing memorandum, Van Sellner was indicted for armed robbery and pleaded guilty to that offense, despite the lack of factual support for it that indicted offense. Id. at 608-09, 787 S.E.2d at 526. In contrast, Petitioner pleaded guilty to a lesser-included offense as an attempt to mitigate his risk of a greater sentence because, should he have proceeded to trial, there was a sufficient factual basis to support a conviction on the indicted offense. Since Van Sellner is distinguishable from the present case, it is inapplicable, and the PCR court was right to deny the Motion to Alter or Amend with respect to this argument.<sup>2</sup>

Petitioner has failed to demonstrate that the PCR court erred in denying Petitioner's Motion to Alter or Amend because the Motion provided no basis for the PCR court's altering or

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<sup>2</sup> Respondent also relies upon its argument as to the sufficiency of the factual basis supporting Petitioner's pleas to ABHAN as the lesser-included offense of attempted murder, which is found heretofore in this Return to Petition for Writ of Certiorari.

amending its decision, and Petitioner has not provided in its Petitioner for Writ of Certiorari any reason that the PCR court erred in that denial. Certiorari should be denied.

**CONCLUSION**

For the foregoing reasons, this Court should deny the Petition for a Writ of Certiorari. Should this Court grant the petition, Respondent seeks permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON  
Attorney General

TAYLOR ZANE SMITH  
Assistant Attorney General  
S.C. Bar No. 103282

Post Office Box 11549  
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By:   
ATTORNEYS FOR RESPONDENT

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August 16, 2019

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AUG 21 2019

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO ANDERSON COUNTY

Certiorari to Anderson County  
J. Cordell Maddox, PCR Judge  
R. Scott Sprouse, Plea Judge

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Appellate Case No. 2018-00928

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EDRICK PEREGO,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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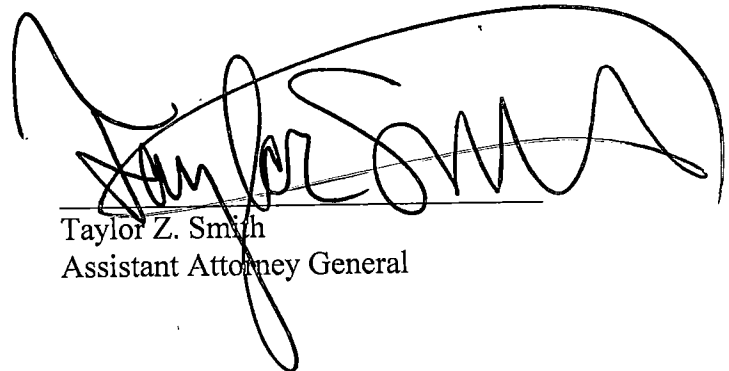
**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

**Susannah C. Ross, Esquire  
Ross & Enderlin, PA  
330 East Coffee Street  
Greenville, South Carolina 29601**

This 16<sup>th</sup> day of August, 2019



---

Taylor Z. Smith  
Assistant Attorney General



ALAN WILSON  
ATTORNEY GENERAL

August 16, 2019

RECEIVED

AUG 21 2019

S.C. SUPREME COURT

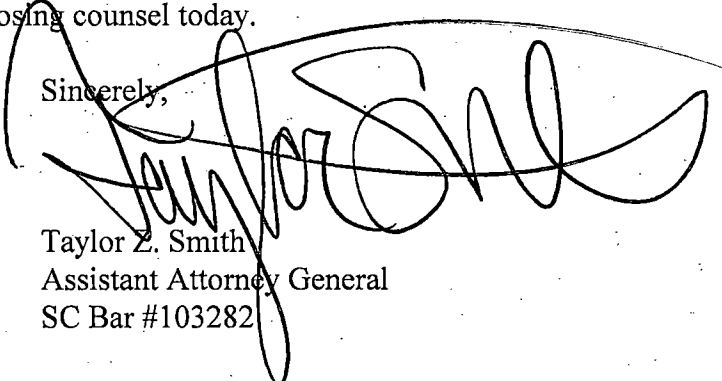
The Honorable Daniel E. Shearouse  
Clerk – South Carolina Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

**Re: Edrick Perego v. State of South Carolina**  
**Appellate Case No. 2018-00928**  
**Lower Court Case No. 2017-CP-04-1175**

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,

  
Taylor Z. Smith  
Assistant Attorney General  
SC Bar #103282

TZS/ch

cc: Susannah C. Ross, Esquire